Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

STATE OF NEBRASKA,

Petitioner,

vs.

RONALD E. WILLIAMS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nebraska

PETITION FOR WRIT OF CERTIORARI

Submitted by:

DON STENBERG, #14023
Attorney General

J. KIRK BROWN, #10456
Counsel of Record
Assistant Attorney General
P.O. Box 98920
Lincoln, Nebraska 68509-8920
Tel: (402) 471-2682

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The Nebraska Supreme Court has ruled that every second degree murderer convicted in Nebraska since 1979, including those who pleaded guilty, must be retried (approximately 130 murderers). The following questions therefore, are of enormous importance to the people of Nebraska.

1. Whether the Guarantee Clause of the federal constitution protects the citizens of the State of Nebraska from the creation of state law by individuals not duly elected by the people of that state.

2. Whether a criminal defendant's Sixth Amendment right to counsel has been abridged when the record affirmatively demonstrates that the now challenged actions of that defendant's trial counsel were (1) in conformity with a century of state law, (2) in conformity with the statutes under which the alleged crime was prosecuted, and (3) in conformity with the uniform practice of trial counsel's peers in the practice of criminal law within that jurisdiction at that time.

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Thomas C. Berg, The Guarantee of Republican Government: Proposals For Judicial Review, 54 U. Chi. L. Rev. 208, 235 (1987) 12

The petitioner respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of the State of Nebraska.

OPINIONS BELOW

The petitioner seeks a writ of certiorari from the opinion of the Supreme Court of the State of Nebraska filed in *State of Nebraska v. Ronald E. Williams*, 247 Neb. 931, 531 N.W.2d 222 (May 5, 1995). (App. 1). The opinion below effectively requires that every second degree murderer in Nebraska convicted since 1979 be retried.

STATEMENT OF JURISDICTION

(i)

The opinion in question was filed May 5, 1995. (App. 1).

(ii)

Rehearing was denied June 1, 1995. (App. 18).

(iii)

The jurisdiction of this Court to review the judgment in question is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS APPLICABLE

Question 1

> The United States shall guarantee to every State in this Union a Republican Form of Government.

The Constitution of the United States, Article IV, Section 4.

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Constitution of the State of Nebraska, Article II, Section 1.

> [T]he legislative authority of the state shall be vested in a Legislature consisting of one chamber.

Constitution of the State of Nebraska, Article III, Section 1.

> A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

Neb. Rev. Stat. § 28-304 (1989).

Question 2

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

The Constitution of the United States, Article VI.

STATEMENT OF THE CASE

QUESTION 1

A. The statute

Prior to January 1, 1979, the Nebraska Legislature had defined the crime of second degree murder as follows:

> Whoever shall purposely **and maliciously**, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree;

Neb. Rev. Stat. § 28-402 (1974) (emphasis added).

With the enactment of Laws 1977, LB 38, § 19[1] (hereinafter "LB 38"), effective January 1, 1979, the Nebraska Legislature recodified its criminal code and specifically **repealed** "malice" as an element of the crime of second degree murder. Since January 1979 the statutes of Nebraska have defined the crime of second degree murder as follows:

> A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

Neb. Rev. Stat. § 28-304 (1989).

B. The offense

On April 12, 1986 the respondent, Ronald E. Williams (hereinafter "Williams"), shot and killed an unarmed Eric Holmes following a verbal altercation.

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[1] App. 21.

Williams was charged with first degree murder, tried and convicted by a jury of the lesser included offense of second degree murder. As this homicide occurred after the effective date of LB 38, Williams' jury's instructions complied with the statute and did not list malice as an element of the lesser included offense of second degree murder. Williams' only assignment of error on direct appeal was the sufficiency of the evidence to convict, the Nebraska Supreme Court affirmed and Williams' judgment of conviction became final. *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987) (hereinafter "*Williams I*").

C. Ignoring the legislative act and the creation of a common law crime.

On January 14, 1994 the Nebraska Supreme Court filed its opinion in *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). In that opinion the court addressed an issue not assigned or briefed by the parties and on its own motion held:

> The omission in the [jury] instructions on second degree murder of malice as an element of that crime was prejudicially erroneous and constituted plain error, thereby entitling Myers to reversal of his convictions and a new trial.

Id., 244 Neb. at 909. *Myers* also concerned a post-LB 38 crime.

D. Williams' collateral litigation

In 1988, Williams filed his first state postconviction proceeding[2], counsel was appointed, and an evidentiary hearing was held on Williams' 18 separate allegations that his trial counsel, the Chief Deputy Douglas County Public Defender, was constitutionally ineffective. Relief was denied. The failure of Williams' counsel to object to his malice-less second degree murder jury instruction was **not** among the 18 claims of ineffective assistance urged. The Nebraska Supreme Court considered those claims raised below on appeal, and affirmed the state trial court's denial of state postconviction relief. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990) (hereinafter "*Williams II*").

On these claims – insufficient evidence and ineffective counsel – Williams next prosecuted a federal habeas corpus action and, again, relief was denied. *Williams v. Dahm*, 963 F.2d 216 (8th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 260, 121 L.Ed.2d 191 (hereinafter "*Williams III*").

E. Williams obtains relief

His federal habeas action having failed to obtain him relief, Williams next filed, in 1994, a second state postconviction action claiming that his conviction was void under the Nebraska Supreme Court's 1994 ruling in *Myers*. The state trial court found that Williams' motion

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[2] Neb. Rev. Stat. § 29-3001 (1989)

for state postconviction relief was successive[3] and denied relief. (App. 21-22).

On appeal, a sharply divided Nebraska Supreme Court granted Williams a new trial finding his original trial counsel had been ineffective under the Sixth Amendment in failing to object to the malice-less jury instruction on second degree murder. *State v. Williams*, 247 Neb. 931, 531 N.W.2d 222 (May 5, 1995) (hereinafter *"Williams IV"*).

QUESTION 2

Under *Strickland v. Washington*, 466 U.S. 668 (1984), the first standard for evaluating the effectiveness of a criminal defendant's counsel under the Sixth Amendment is whether that counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in that area.

Williams' trial counsel did not challenge the malice-less second degree murder instruction presented Williams' jury in 1986, which defined the crime in the language of the statute. That attorney has now been found by a majority of the Nebraska Supreme Court to have violated the Sixth Amendment in failing to do so. Yet no other attorney practicing criminal law in the State of

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[3] "Ordinarily, [a Nebraska] court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion." *Williams IV*, 247 Neb. at 935.

Nebraska in the 15 years between the January 1979 effective date of LB 38 and the Nebraska Supreme Court's 1994 ruling in *Myers* had done so either.

REASONS FOR GRANTING THE WRIT

QUESTION 1

WHETHER THE GUARANTEE CLAUSE OF THE FEDERAL CONSTITUTION PROTECTS THE CITIZENS OF THE STATE OF NEBRASKA FROM THE CREATION OF LAWS BY A BODY NOT DULY ELECTED BY THE PEOPLE OF THAT STATE.

Introduction

A.

This case is of enormous practical importance to the State of Nebraska. The Nebraska Supreme Court's ruling in this case effectively requires the release or retrial of every convicted second degree murderer in Nebraska from 1979 forward, approximately 130 admitted or convicted killers.

B.

This case is also of great legal importance because it squarely presents the question of whether the guarantee clause of the U.S. Constitution prohibits the state judiciary from literally enacting a criminal law when the state constitution has assigned that power specifically and exclusively to the state legislature.

The citizens of the State of Nebraska, also being citizens of the United States, are presently confronted here with an unanticipated and glaring shortcoming of

the traditional checks-and-balances system of constitutional government. We now discover that for such a system to work the Judicial Branch must be content to be the neutral arbiter of disputes between the Executive Branch, the Legislative Branch and the people. If the Judicial Branch, being the final arbiter of constitutional questions, attempts to legislate or govern, this system fails.

Unfortunately, the fatal flaw we witness here arises, in part, from a well intentioned effort to preserve and enhance the **neutrality** of our state judiciary by isolating them from the pressures of public opinion. Our judiciary is not elected, and once appointed they do not face opposition for retention.[4]

We now observe the other edge of that sword. Once insulated from public control, a judiciary – particularly the **highest** court of a state – which chooses to seize and exercise a power clearly vested by the citizens of that state in another branch of government, is without a master. The checks-and-balances which are intended to protect all citizens from an arbitrary exercise of governmental power dissolve before our eyes. Those offended by that act have nowhere to turn for redress within their state. Their sole source of hope is this Court and the Guarantee Clause of the federal constitution.

I. NEBRASKA'S INTENDED SYSTEM OF GOVERNMENT

The Constitution of the State of Nebraska is the seminal expression of the will of the citizens of this State

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[4] *Constitution of the State of Nebraska*, Art. V, Section 21.

insofar as their desires for the structure of their state government. It is clear from the face of that document that one branch of state government is forbidden from exercising a power vested by the citizens of this state in another branch of government.

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Constitution of the State of Nebraska, Article II, Section 1.

It has long been understood in Nebraska that the power to define crimes within this state rests solely with the Legislative Branch of state government, not the judiciary.

> [T]he legislative authority of the state shall be vested in a Legislature consisting of one chamber.

Constitution of the State of Nebraska, Article III, Section 1.

> In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so;

State v. De Wolfe, 67 Neb. 321, 322, 93 N.W. 746 (1903).

> It is not within the powers of the judicial branch of the government . . . to enact laws or to define or punish crime. Those matters are wholly within the province of the Legislature.

Kinnan v. State, 86 Neb. 234, 236, 125 N.W. 594 (1910). *See also Campion v. Gillan*, 79 Neb. 364, 370, 112 N.W. 585 (1907); *State v. Schenckloth*, 210 Neb. 144, 313 N.W.2d 438, 441 (1981); *State v. Pettit*, 233 Neb. 436, 451, 445 N.W.2d 890 (1989).

The relevant clauses of Nebraska's constitution have not changed in any respect relevant to this question during this century.

The members of the Nebraska Legislature are elected and thus directly responsible to the citizen's of this state. *Constitution of the State of Nebraska*, Art. III, Section 5. The members of the Nebraska Supreme Court, by contrast, are not elected. Constitution of the State of Nebraska, Art. V, Section 21.

II. THE GUARANTEE CLAUSE

A. The clause

The Guarantee Clause provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government.

The Constitution of the United States, Article IV, Section 4.

B. The guarantee

The admission of the State of Nebraska into the Union was predicated upon Nebraska's chosen form of government conforming with the Guarantee Clause. As the Nebraska Supreme Court itself has noted, "The preamble to the act of congress of February 9, 1867 (14 U.S. Statutes at Large, Ch. 36, p. 391), which provided for the admission of the State of Nebraska to the Union recites: ' . . . whereas it appears that the said people have adopted a constitution which, upon due examination, is found to . . . be republican in its form of

government. . . . ' " *State v. Brian*, 84 Neb. 30, 36, 120 N.W. 916 (1909).

While a "republican form of government" may have certain variations, such as Nebraska's selection of a one-house legislative body, widespread agreement exists among scholars and jurists about the core meaning of republican government. "[T]he distinguishing feature 'of a republican form of government' is the right of the people to **choose** their own officers for governmental administration, and **pass their own laws**." *Duncan v. McCall*, 139 U.S. 449, 461, 11 S.Ct. 573 (1891) (emphasis added). *Accord, Harris v. Shanahan*, 387 P.2d 771, 789 (Kan. 1963). Here we believe the citizens of the State of Nebraska to be aggrieved because the Judicial Branch of state government, created to be insulated from the people, has now usurped a power – the definition of criminal behavior – which the citizens of Nebraska have specifically **reserved** in their state constitution exclusively to their **elected** representatives in the Legislative Branch of state government. Constitution of the State of Nebraska, Art. II, Section 1.

"Since at least the eighteenth century, political thinkers have stressed that a republican government is one in which the people control their rulers." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 Colum.L.Rev. 1, 23 (1988). *See also Harris*, 387 P.2d at 789.

A necessary corollary of this fundamental principal is that state governmental entities must comply with the strictures of their state constitutions and laws. Otherwise,

the guarantee of a government in which the people govern could be effectively voided by the failure or refusal of state officials to follow the direction of the people as expressed in their respective state constitutions. *See* Thomas A. Smith, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561 (1984). "The guarantee clause should be read as securing the 'rule of law' in the states. Such an interpretation would require that each state obey its own constitution and statutes, or change those laws by legally valid means." *Id.* at 565.

If the Legislative or Executive Branches of state government violate the state constitution the principal safeguard and remedy is found in the state courts. However, "[i]f a state **court** has clearly misread or refused to enforce the state constitution or laws, the parties involved have not received the protection due them under the state law, and therefore, the guarantee clause has been violated." *Id.* at 579. *See also* Thomas C. Berg, *The Guarantee of Republican Government: Proposals For Judicial Review*, 54 U.Chi.L.Rev. 208, 235 (1987) ("The Guarantee Clause should be the basis for enforcing the nondelegation principle against the states.").

> The incapacity of . . . the judiciary to execute a power which is essentially and merely a legislative power . . . [and] the separation and independence of distinct departments of government, is fundamental to the very existence of constitutional government as established in the United States.

Tyson v. Washington County, 78 Neb. 211, 215, 110 N.W. 634 (1907). (*quoting Norwalk Street R. Co.'s Appeal*, 69

Conn. 576, 39 L.R.A. 794). "There can be no liberty . . . if the power of judging be not separated from the legislative and executive powers. . . . " *Id.* at 216 (*quoting* Montesquieu in *State v. Johnson*, 61 Kan. 803, 49 L.R.A. 665). If a state's highest court is the source of the violation of a republican form of government, rather than the remedy for it, then the citizens' only recourse is to the federal constitution itself.

A legislature's power is materially curtailed where the judiciary assumes the role of defining the elements of a criminal offense. *See VanSickle v. Shanahan*, 511 P.2d 223, 243 (1973). The Nebraska Legislature cannot re-repeal the element of malice from its definition of the crime of second degree murder. From the standpoint of the Legislature, it is gone. Here its absence is simply being ignored by the Judicial Branch of state government.

Under such circumstances, the violation of the separation of powers doctrine (which, in this context, is "inherent in the republican form of government", *id.* at 241), through the refusal of the Nebraska Supreme Court to adhere to the elements of a crime clearly set forth in statute, is a violation of the Guarantee Clause. *Id.* at 235-244. *Accord State v. Lehtola*, 198 N.W.2d 354, 356 (Wis. 1972) (transfer of a substantial power from one branch of the government to another branch, or transfer of a power which is essential to the 'separation of power' doctrine, is a violation of Article IV, Section 4 of the Constitution). But *see People of City of Thornton v. Horan*, 556 P.2d 1217, 1220 (Colo. 1976), *cert. denied*, 431 U.S. 966 (1977); *In re Interrogatories Propounded By Senate, etc.*, 536 P.2d 308, 316 (Colo. 1975).

Unlike the situation in *People of City of Thornton* and *In re Interrogatories*, the people of Nebraska have not authorized the actions of the Nebraska Supreme Court in this situation; in fact, they have specifically – through their state constitution – sought to prohibit such action. *See People of City of Thornton*, 556 P.2d at 1220. They have clearly delegated the authority to define the elements of criminal offenses to their elected Legislature and sought to prohibit, through the separation of powers clause of their state constitution, Judicial Branch encroachment upon that power. Constitution of the State of Nebraska, Art. II, Section 1.

The failure of a state's highest court to follow a clear Legislative definition of the behavior the Legislature chooses to deem criminal, and the injection by that court of an additional element for which it simply has a preference, **directly** violates the Guarantee Clause by encroaching on the Nebraska citizens' right under our **federal** constitution to have the laws under which they live enacted by their **elected** representatives.

QUESTION 2

WHETHER A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL HAS BEEN ABRIDGED WHEN THE RECORD AFFIRMATIVELY DEMONSTRATES THAT THE NOW CHALLENGED ACTIONS OF THAT DEFENDANT'S TRIAL COUNSEL WERE (1) IN CONFORMITY WITH A CENTURY OF STATE LAW, (2) IN CONFORMITY WITH THE STATUTES UNDER WHICH THE ALLEGED CRIME WAS PROSECUTED, AND (3) IN CONFORMITY WITH THE UNIFORM PRACTICE OF TRIAL COUNSEL'S PEERS IN THE PRACTICE OF CRIMINAL LAW WITHIN THAT JURISDICTION

Introduction

In this case a divided Nebraska Supreme Court has found an ineffective assistance of counsel violation of the Sixth Amendment of the federal constitution in a situation in which the "ineffective" counsel is faulted for honoring and following pre-existing state law and then-applicable state statutes.

More importantly, however, this counsel is further faulted for failing to do what every other defense counsel in the State of Nebraska was also failing to do between January 1979 and January 1994, that is failing to conceive of the argument that the Nebraska Supreme Court, rather than Nebraska's Legislature, was free to define the elements of a crime under Nebraska law. Williams' trial counsel did not conduct this defense in a manner deviant from that of his peers in the criminal practice of law. Williams' counsel undertook exactly the **same** course of conduct as did his peers confronted with this same factual situation. Such behavior is not a violation of *Strickland v. Washington*, 466 U.S. 668 (1984).

I. WILLIAMS WAS DECIDED UNDER A FEDERAL CONSTITUTIONAL STANDARD

We note at the outset that there should be no confusion that Williams was granted relief based upon the Nebraska Supreme Court's perception that there exists here a **federal** constitutional violation. "This court has adopted a two-part test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 . . . " *Williams IV*, 531 N.W.2d at 227. (App. 8).

II. THE STATE COURT'S *STRICKLAND* ANALYSIS

As noted above, Nebraska has adopted the *Strickland v. Washington* two-pronged test for ineffective assistance of counsel. *See State v. Robinson*, 218 Neb. 156, 352 N.W.2d 879 (1984). In *Williams IV* the majority opinion correctly states the applicable test as follows:

> [T]he standard for determining the propriety of the claim is **[1]** whether the attorney, in representing the accused, performed as least as well as a lawyer with ordinary training and skill in the criminal law in the area. **[2]** Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.

Williams IV, *Id.* at 937, 531 N.W.2d at 227. (App. 8). It is in its analysis of this first element of the *Strickland* test where the majority of a sharply divided Nebraska Supreme Court falls short.

The test of an attorney's performance under the Sixth Amendment and *Strickland* is a "peer" standard: How do the efforts of this counsel compare to those of his contemporaries of the criminal defense bar at that place and time?

The majority opinion's protestations to the contrary, Williams' counsel has been found to have violated *Strickland* because he did not, in 1986, anticipate the Nebraska Supreme Court's injection of an additional, non-legislative element into the definition of the crime of second degree murder in 1994.

A. The majority opinion's line of cases

The first prong of the *Strickland* test must here be addressed within the **factual** framework of the Nebraska Supreme Court's injection of malice as an additional, non-legislative element of the offense of second degree murder.

The majority opinion concludes that in 1986 Williams' trial counsel should have been aware of the fact that the Nebraska Legislature's 1979 repeal of malice as an element of the crime of second degree murder was somehow ineffective. In support of this proposition the majority opinion offers a list of 15 Nebraska cases[5] upon which, it believes, "effective" counsel would have relied in 1986. Let us review the "evidence" offered by the majority opinion.

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[5] *Williams IV,* 531 N.W.2d at 228. (App. 10-11).

Twelve of the fifteen cases relied upon by the majority were decided **after** Williams' trial was concluded on November 21, 1986. *See State v. Secret* (1994); *State v. Ladig* (1994); *State v. Grimes* (1994); *State v. Blackson* (1994); *State v. Myers* (1994); *State v. Franklin* (1992); *State v. Smith* (1992); *State v. Illig* (1991); *State v. Dean* (1991); *State v. Trevino* (1988); *State v. Ettleman* (1988); and *State v. Moniz* (Dec. 12, 1986). It is wholly inappropriate and illogical to evaluate an attorney's trial performance in 1986 based upon **subsequent** developments in the law of the state in which he practices.

Two of the remaining three cases must also be discounted as they specifically involve crimes committed **before** malice was repealed as an element of second degree murder. *State v. Samuels*, 205 Neb. 585, 588, 289 N.W.2d 183 (1980) (Nov. 16, 1978 killing); and *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979) (July 22, 1978 killing).

That leaves only one of the majority's fifteen cases even arguably applicable. That single case is *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Absolutely critical to the Sixth Amendment analysis in which we are now engaged should be the fact that the *Myers* issue was **never** urged by Rowe's counsel as a basis for reversal and was **not** pivotal to the outcome of that case. *Id.*, 214 Neb. at 686. The statement contained in *Rowe*, relied upon by the majority, was incidental to the result, and had no precedential value to the criminal law of Nebraska in 1986, nor is it relevant to the inquiry before us now.

B. Contrary authority from the same court

In the fifteen years between January 1979, when Nebraska's malice-less second degree murder statute became effective, and January 1994, when this court's "plain error" opinion in *Myers* was released, **not one attorney** in the State of Nebraska apparently saw fit to challenge Neb. Rev. Stat. § 28-304 (1989) as being deficient in its definition of the crime of second degree murder.

In fact, in the four years preceding Williams' trial the Nebraska Supreme Court **affirmed** four malice-less second degree murder convictions without observing the "plain error" later "discovered" in *Myers*. *See State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984); *State v. Sims*, 213 Neb. 68, 331 N.W.2d 255 (1983) (In affirming, Justice Caporale wrote for the court: "Defendant-appellant Walter L. Sims, was charged with second degree murder; the intentional but unpremeditated killing of Gregory S. Combs."); *State v. Brown*, 213 Neb. 68, 327 N.W.2d 107 (1982); *State v. Hardin*, 212 Neb. 774, 779, 326 N.W.2d 38, 40 (1982).

Thus, at the time of Williams' trial, four Nebraska Supreme Court cases had affirmed second degree murder convictions couched in the terms of LB 38. This history supports, rather than discredits, the actions of Williams' trial counsel here challenged.

Beyond that, this "plain" error was never observed by Williams' new attorneys in *Williams II* and *Williams III*, although they would surely have been the peers of Williams' trial attorney and represented the standard of practice by

which Williams' trial counsel should be judged under *Strickland*.

Finally, it is worthy of note that this "plain" error which trial counsel is now deemed to have been constitutionally "ineffective" for not raising, was also never observed by the Nebraska Supreme Court when it reviewed and affirmed *Williams I* in 1987 and *Williams II* in 1990.

C. Ineffective counsel?

In view of the *Strickland* standard and the factual history discussed above, Williams' trial counsel clearly "performed as least as well as a lawyer with ordinary training and skill in the criminal law in the area." However, the Nebraska Supreme Court's majority opinion erroneously and inexplicably departs from accepted *Strickland* analysis to arrive at the contrary result.

If **not one** criminal defense attorney in the State of Nebraska challenged the sufficiency of a malice-less second degree murder statute prior to Williams' trial, then under the first prong of the *Strickland* test, **no** attorney, including Williams', was constitutionally deficient for failing to challenge the statute or jury instructions drafted in compliance with the statutory language.

There exists a historical reason for this uniform lack of attack upon statutorily defined crimes. For nearly a century, and well past the time of Williams' trial, the Nebraska Supreme Court had steadfastly adhered to the proposition that under the constitution and laws of Nebraska: "There are no common-law crimes in

Nebraska." *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762, 768 (1989); *State v. Douglas*, 222 Neb. 833, 388 N.W.2d 801 (1986); *Kinnan v. State*, 86 Neb. 234, 125 N.W. 594 (1910).

Based upon that premise the Nebraska Supreme Court had also adhered for nearly a century to the proposition that: "[T]o to charge a statutory offense **it is sufficient if it be charged in the language of the statute**." *Cordson v. State*, 77 Neb. 416, 417, 109 N.W. 764 (1906) (emphasis added); *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993).

We are aware of only two attorneys in the entire history of Nebraska law who even publicly **suggested** that Neb. Rev. Stat. § 28-304 (1989) was somehow infirm prior to this court's 1994 "plain error" opinion in *Myers*. They sat then and they sit now as members of the Nebraska Supreme Court. They were a minority. Now they sit with the *Williams* majority. *See State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989) Fahrnbruch, J., and White, J., dissenting. For *Strickland* "peer" analysis purposes, those two voices carry no weight.

First, these two attorneys first published their theory that a malice-less second degree murder statute was somehow infirm **three years after** Williams' trial. Second, these two attorneys were not the *Strickland*, trial-practitioner-peers of Williams' counsel. Third, when offered in 1989, the suggestion that § 28-304 (1989) required judicial amendment was soundly **rejected** by the Nebraska Supreme Court.

Against this historical backdrop, how can Williams' 1986 trial counsel be found to have violated *Strickland*? **Not one** practicing attorney in the State of Nebraska

forwarded the *Myers* argument on behalf of a criminal defendant before Williams' 1986 trial. Furthermore, the law of Nebraska had been clear for nearly a century that a crime charged and a jury instructed in the language of the statute defining the crime was legally sufficient.

There is absolutely no evidence of "deficient performance" here, the first element of the *Strickland* test simply cannot be met, no Sixth Amendment violation has been established, and the majority opinion of the Nebraska Supreme Court on these facts does a great disservice to the rulings of this Court under the Sixth Amendment.

CONCLUSION

The citizens of the State of Nebraska pray that their petition for a writ of certiorari be granted. The public safety of these citizens teeters in the balance against the retrial and possible release of approximately 130 admitted or convicted killers.

A.

A bare majority of the members of the Nebraska Supreme Court have taken it upon themselves not only to judge but to legislate for the citizens of Nebraska, by whom they are **not** elected and to whom they are **not** accountable. Contrary to the Nebraska constitution and nearly a century of Nebraska law, this judicial majority has chosen to ignore the power of Nebraska's Legislature to define crimes in this state and, if not stopped, has

launched Nebraska into an era of common law crimes specifically prohibited by the Nebraska Constitution.

The citizens of the State of Nebraska have a right, not only under their state constitution, but under our federal constitution, to have the laws under which they live enacted by individuals the citizens **elect** to that power. That is the role of the Guarantee Clause. A role not often deemed necessary to exercise in our "modern" times, but a role vitally necessary to the citizens of Nebraska now. To whom do the citizens of Nebraska turn for relief from the actions of their state's highest court? This Court appears to be their last resort.

The whole beauty of and theory behind our checks-and-balances system of constitutional government is that any governmental power must be checked. Unchecked power in any branch of government is the antithesis of what we stand for in this country. Yet unfortunately an unchecked exercise of governmental power by a majority of the Nebraska Supreme Court is what we face here. The citizens of Nebraska pray for relief.

B.

Beyond our Guarantee Clause concerns, the Sixth Amendment analysis of the Nebraska Supreme Court majority in this case departs factually and legally from anything anticipated by *Strickland* and the cases which follow. Great damage to the appropriate application of the Sixth Amendment by the Nebraska courts will be suffered if the perceived errors of this case are not corrected.

C.

In the end, this case will resolve itself – as apparently do all issues in government – upon questions of power: Who has it and for what end will it be exercised? We ask the Court to exercise its power to guarantee to the citizens of the State of Nebraska their rights under their state and our federal constitutions.

Respectfully submitted,

By Don Stenberg, #14023
Attorney General

J. Kirk Brown, #10456
Counsel of Record
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682

Nebraska Advance Sheets
STATE v. WILLIAMS
Cite as 247 Neb. 931

STATE OF NEBRASKA, APPELLEE, v. RONALD E. WILLIAMS, APPELLANT.

___N.W.2d___

Filed May 5, 1995. No. S-94-542.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded with direction.

Ronald E. Williams, pro se.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, WRIGHT, and CONNOLLY, JJ.

PER CURIAM.

Ronald E. Williams, through a postconviction relief motion, asked the district court for Douglas County for a new trial in regard to his second degree murder conviction. That court denied Williams' request, and he appealed.

We find that the postconviction trial court erred when it failed to grant Williams postconviction relief.

ASSIGNMENTS OF ERROR

In his brief, Williams, in substance, claims the postconviction court committed four errors. To dispose of this appeal, we need discuss only two of the issues raised by the assigned errors: (1) whether the court at Williams'

original trial erred when it failed to include in its instruction to the jury that "malice" is a material element of second degree murder, and (2) whether Williams was denied effective assistance of counsel when his trial counsel did not object to the original trial court's omission in its jury instructions of "malice" as a material element of second degree murder.

FACTS

On October 6, 1986, a jury found Williams guilty of second degree murder and use of a firearm to commit a felony in the April 13, 1986, death of Eric Holmes. Williams was sentenced to 20 years' imprisonment for the second degree murder charge and 3 years' imprisonment on the firearm charge, the sentences to run consecutively. This court detailed the facts surrounding Holmes' death in *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987), and held that the State presented sufficient evidence to support the conviction.

On July 12, 1988, Williams, acting pro se, filed a motion to vacate and set aside his conviction for second degree murder because of ineffective assistance of trial counsel. The district court appointed counsel, held an evidentiary hearing, and denied the motion. On appeal, we held that Williams failed to establish a basis for post-conviction relief, and we affirmed the judgment of the district court. *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990). Thereafter, Williams filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Nebraska, alleging that there was insufficient evidence to support his conviction and that he had had ineffective

assistance of counsel. The federal court denied Williams' petition. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the trial court's judgment. The appeals court held that the evidence was more than sufficient to support Williams' conviction and that he had failed to establish that the alleged errors by his counsel prejudiced his defense. *Williams v. Dahm*, 963 F.2d 216 (8th Cir. 1992), *cert. denied* ___ U.S. ___, 113 S. Ct. 260, 121 L. Ed. 2d 191.

Williams, at his jury trial and on his direct appeal to this court, was represented by the Douglas County public defender's office. In his postconviction relief motion, Williams had appointed counsel. He also had appointed counsel in his federal court proceedings in the Eighth Circuit Court of Appeals. None of Williams' counsel in any of those proceedings brought to any court's attention that the court at Williams' jury trial had failed to instruct the jury that malice is a material element of second degree murder and that to convict Williams, it was necessary for the State to prove beyond a reasonable doubt not only that Williams intentionally caused the death of Holmes without premeditation but that he did so with malice. Malice is that condition of the mind which is manifested by intentionally doing a wrongful act without just cause or excuse. *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994).

On April 4, 1994, Williams filed pro se a second motion for postconviction relief in the district court for Douglas County. Williams alleged that the trial court violated his rights under Neb. Const. art. I, § 3, and the 5th and 14th Amendments to the U.S. Constitution by not including in its jury instructions that malice is an element

of second degree murder. Williams also alleged that he received ineffective assistance of counsel in violation of Neb. Const. art. I, § 11, and the Sixth Amendment to the U.S. Constitution because his counsel failed to object to the trial court's omission of malice as an element of second degree murder in its instructions to the jury. Williams requested an evidentiary hearing and moved for appointment of counsel.

The district court denied Williams' request for an evidentiary hearing and overruled his April 4, 1994, motion for postconviction relief. The second postconviction relief court held that Williams procedurally defaulted by not raising the issue of the jury instruction in his direct appeal or in his previous postconviction motion. The district court then proceeded to address the merits of the motion. The court acknowledged that the jury instructions did not include malice as an element of second degree murder. The court, contrary to the holdings of this court, then held that the trial court acted appropriately in omitting malice as an element of second degree murder.

In his assignments of error, Williams claims that the second postconviction district court erred in failing to find that (1) the original trial court improperly instructed the jury by omitting malice as a material element of second degree murder, and (2) Williams received ineffective assistance of trial counsel.

Initially, we note that the district court, in its denial of Williams' postconviction motion, was most critical of this court's reasoning and holdings in *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and its progeny: *State v.*

Franklin, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); and *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), which continued to hold that malice is a material element of second degree murder. We take this opportunity to remind lower court judges that if the facts are the same as those involved in a holding of this court in a similar case, it is not only their duty but also their obligation to follow the law as has been announced by the Nebraska Supreme Court.

As previously stated, Williams' counsel did not challenge the erroneous jury instruction in his original motion for postconviction relief. Ordinarily, an appellate court will not entertain a successive motion for postconviction relief unless the motion affirmately shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. See, *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). However, an appellate court is compelled to accept jurisdiction when the sentence entered by the trial court is invalid due to plain error in the proceedings. See *State v. Rolling*, 218 Neb. 51, 352 N.W.2d 175 (1984). An appellate court always reserves the right to note plain error of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994).

A criminal defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court will not be disturbed unless clearly erroneous. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). Furthermore, a criminal defendant in a postconviction proceeding has the burden of alleging and proving that a claimed error is prejudicial. See *State v. Jones*, 246 Neb. 673, 522 N.W.2d 414 (1994).

A defendant moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or U.S. Constitution. *State v. Sims*, 244 Neb. 771, 509 N.W.2d 6 (1993).

The record presented in this appeal does not contain the jury instructions. However, the second postconviction district court found that the instructions had, in fact, failed to include malice as an element of second degree murder. Moreover, when cases are interwoven and interdependent and a controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has the right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989), *overruled on other grounds, State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). Thus, we take judicial notice of the record in Williams' direct appeal to this court.

The record from Williams' direct appeal shows that the State charge Williams with murder in the first degree and use of a firearm to commit a felony. Among the

instructions given to the jury was instruction No. 5. It was a "step" instruction directing the jury to find Williams guilty or not guilty of first degree murder, and if it found that he was not guilty of first degree murder, then to make a finding regarding second degree murder or, if necessary, manslaughter. As to second degree murder, the instruction read:

> The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:
>
> 1. That defendant killed Eric Holmes;
>
> 2. That defendant did so intentionally but without premeditation;
>
> 3. That defendant did so on or about April 13, 1986;
>
> 4. That defendant did so in Douglas County, Nebraska; and
>
> 5. That defendant's actions were not justified as set out in Instruction No. 10.
>
> The State has the burden of providing beyond a reasonable doubt each and every one of the foregoing material elements of the crime of murder in the second degree necessary for conviction.

The court further emphasized the distinctions between first degree murder, second degree murder, and manslaughter in jury instruction No. 7, which read, in relevant part: "A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation."

It is undisputed that Williams' trial counsel did not object to jury instruction No. 5 or 7. Williams claims that he received ineffective assistance of counsel due to counsel's failure to object to the instructions.

This court has adopted a two-part test for proving a claim of ineffective assistance of counsel, as set forth by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). When a defendant in a postconviction motion alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). See *State v. Clausen, ante* p. 309, 527 N.W.2d 609 (1995).

The first prong in determining the propriety of Williams' claim is whether the trial attorney, in representing the defendant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. A defendant, therefore, must show that counsel's performance fell below an objective standard of reasonableness. *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994).

In a criminal trial, the court in its instructions must delineate for the jury each material element the State is required to prove beyond a reasonable doubt to convict the defendant of the crime charge. *State v. Nielsen, supra.*

In State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994), we held that it is plain error for a jury instruction on second degree murder to omit malice as an element. Williams' jury trial court committed the identical error in its jury instruction in defining the elements of second degree murder. Williams' counsel's failure to object to the erroneous jury instruction permitted the jury to find Williams guilty of second degree murder without consideration of whether his actions satisfied a material element of the crime. The failure of defense counsel in a criminal trial to object to an instruction which omits a material element of the crime charge cannot be considered to be within the wide range of professionally competent assistance. See *Gray v. Lynn*, 6 F.3d 265 (5th Cir. 1993).

The State, referring to a "line of cases" in which we upheld second degree murder convictions even though malice was not mentioned, brief for appellee at 8, contends that in 1986 it could not be ineffective assistance for a criminal defense attorney to not object to the instruction given the Williams jury. As we stated in *State v. Grimes*, 246 Neb. 473, 484, 519 N.W.2d 507, 516 (1994):

> The State's argument that this court only recently, in *State v. Myers, supra*, added malice as an element of second degree murder, shows ignorance of, or the disregard for, 11 years of consistent holdings by this court. The suggestion that including malice as an element of second degree murder "transgresses important and well-established principles of law" [citation omitted], itself transgresses important and well-established principles of law. As we pointed out

> in *Myers*, if malice were not an element of second degree murder, the homicide statutes would not make sense.

Our holding in *State v. Myers* regarding the essential elements of second degree murder, contrary to the State's position, did not establish a new rule of law but reinforced that "this court has continued to require malice as an element of second degree murder." 244 Neb. at 908, 510 N.W.2d at 63. We have continuously held that the adoption of the current criminal code did not eliminate malice as an element of second degree murder. We reaffirm those holdings as hereinafter set forth.

According to Neb. Rev. Stat. § 28-304(1) (Reissue 1989), "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." The Legislature adopted the current criminal code in 1977, with an effective date of July 1, 1978. See 1977 Neb. Laws, L.B. 38, § 325. Since the effective operative date of 1977 Neb. Laws L.B. 38, the following cases have specifically held that the essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously: *State v. Secret*, 246 Neb. 1002, 524 N.W.2d 551 (1994); *State v. Ludig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Grimes, supra; State v. Blackson*, 245 Neb. 833, 515 N.W.2d 773 (1994); *State v. Myers, supra; State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Smith*, 240 Neb. 97, 480 N.W.2d 705 (1992); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986);

State v. Rowe, 214 Neb. 685, 335 N.W.2d 309 (1983); *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). Clearly, our holding in this case does not subject Williams' counsel to hindsight, as the State contends. Before Williams was tried, the current criminal code was in effect and we had already held that malice continued to be a material element of second degree murder.

The State also contends that an attorney with ordinary skill in the area of criminal law does not object to jury instructions which follow the statutory elements of a crime. Jury instructions that set forth only the statutory elements of a crime are insufficient when they do not set forth all the essential elements of the crime. See *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (citing *State v. Oman*, 265 Minn. 277, 121 N.W.2d 616 (1963); *Ex parte Allred*, 393 So. 2d 1030 (Ala. 1981): *Stevens v. State*, 817 S.W.2d 800 (Tex. App. 1991)).

The fact that Williams' counsel fell below an objective standard of reasonableness does not alone amount to a Sixth Amendment violation. The second prong of the ineffective assistance of counsel standard centers upon whether the deficient performance of counsel prejudiced the defendant's case. The prejudice component focuses on whether counsel's deficient performance rendered the results of the trial unreliable or the proceeding fundamentally unfair by depriving the defendant of a substantive or procedural right. *Lockhart v. Fretwell*, ___ U.S. ___, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

It is the duty of the trial judge in a criminal case to instruct the jury on the pertinent law of the case, whether requested to do so or not. See *State v. Grimes, supra.* An instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *Id.* The essential elements in the crime of murder in the second degree are that the defendant killed the victim purposely and maliciously. Failure to include the element of malice in the jury instruction on second degree murder constitutes plain error. See *State v. Myers,* 244 Neb. 905, 510 N.W.2d 58 (1994). The instruction relied upon by the jury in finding Williams guilty of second degree murder prejudiced the proceedings against Williams.

The jury convicted Williams of second degree murder based upon an incomplete definition of the crime. We note such an error is plain error which deprived Williams of a fundamentally fair and reliable trial. As a result of the prejudicial jury instructions and ineffective assistance of counsel, Williams' convictions must be overturned.

Reversal for trial error, such as incorrect instructions and ineffective assistance of counsel, implies nothing with respect to the guilt or innocence of a defendant. Rather, it is only a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect. Reversal based upon trial error does not bar a retrial of a criminal defendant. See, *Burks v. United States,* 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *State v. Chambers,* 233 Neb. 235, 444 N.W.2d 667 (1989).

We reverse the judgment of the second postconviction district court and grant Williams' postconviction relief motion. Because Williams' conviction for use of a weapon in the commission of a felony is dependent upon his conviction of an underlying felony, both the second degree murder charge and the charge of use of a weapon in the commission of felony are set aside, and the matter is remanded to the district court with direction to grant Williams a new trial on both of the charges.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's decision. As I have consistently stated since *State v. Grimes*, 246 Neb. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting), I disagree with the majority's holding that malice is an essential element of the crime of second degree murder. See, also, *State v. Martin*, 246 Neb. 896, 524 N.W.2d 58 (1994); *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994); *State v. Ladig*, 246 Neb. 542, 519 N.W.2d 561 (1994); *State v. Manzer*, 246 Neb. 536, 519 N.W.2d 558 (1994).

With *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), this court has used the plain error doctrine to expand the scope of its holding that malice is an essential element of second degree murder. In *Myers*, the court found plain error because the jury instructions did not include malice as an element of second degree murder. In *Manzer*, *Ladig*, and *Martin*, the court found plain error because the information charging second degree murder did not allege malice as an element of the crime.

This is Williams' second attempt at postconviction relief based on a claim of allegedly ineffective assistance

of counsel. It is his burden to establish a basis for such relief. See *State v. Williams*, 234 Neb. 890, 453 N.W.2d 399 (1990). In order to sustain a claim of ineffective assistance of counsel, the party must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* In the appeal following Williams' first postconviction relief request, we found that Williams had not established that his trial counsel was ineffective and had failed to establish any prejudice resulting from his trial counsel's decisions. On the appeal following the second postconviction relief request, the majority now holds that Williams had ineffective counsel because the issue of malice as an element of second degree murder was not raised during two prior visits to this court. I disagree.

In Williams' direct appeal, his sole assignment of error was that the evidence was insufficient to sustain the convictions. *State v. Williams*, 226 Neb. 647, 413 N.W.2d 907 (1987). The jury instructions were a part of the record on direct appeal, but this court did not find plain error in the fact that the jury instructions did not include malice as an element of second degree murder. In *Myers*, this court stated that the only issue on Williams' direct appeal was whether the evidence was sufficient to support a conviction for intentional killing rather than Williams' claim of self-defense.

In 1988, Williams filed his first motion for postconviction relief. At the evidential hearing in district court, Williams alleged 18 examples of ineffective assistance by his trial counsel. None of these examples mentioned the

failure of trial counsel to object to the jury instructions. On appeal, Williams set forth five grounds for his claim of ineffective assistance of trial counsel. This court found no merit to any of these claims. We stated: "The evidence at trial against the defendant was overwhelming. His attorney was an experienced trial lawyer who performed as a lawyer possessing ordinary training and skill in criminal law in the area should have done." *Williams*, 234 Neb. at 899-900, 453 N.W.2d at 405.

At his jury trial and on direct appeal, Williams was represented by the Douglas County public defender's office. In his first postconviction action and in the U.S. Court of Appeals for the Eighth Circuit, Williams was represented by court-appointed counsel. None of these attorneys brought to any court's attention the fact that the jury instructions did not state that malice was an element of second degree murder.

In this second postconviction appeal, the majority states: "We have continuously held that the adoption of the current criminal code did not eliminate malice as an element of second degree murder." Thus, the majority establishes that the basis for Williams' requested relief was available to him at the time of his first motion for postconviction relief and on appeal from the denial of that motion. As the majority notes, a second motion for postconviction relief will not ordinarily be entertained unless the motion affirmatively shows on its face that the basis for the requested relief was not available at the time the movant filed the prior motion. See, *State v. Keithley*, *ante* p. 638, ___ N.W.2d ___ (1995); *State v. Lindsay*, 246 Neb. 101, 517 N.W.2d 102 (1994); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993); *State v. Luna*, 230 Neb. 966,

434 N.W.2d 526 (1989). Williams cannot now claim ineffective assistance of counsel at trial, on direct appeal, or during the first postconviction proceeding. He had different counsel for the first postconviction proceeding, and the basis for the relief was available to him at his first postconviction proceeding.

Nor can Williams now argue that his counsel for the first postconviction appeal was ineffective for failing to raise the omission of malice from the jury instructions. One requesting postconviction relief cannot claim constitutionally ineffective assistance of counsel as a result of an attorney's service in a postconviction proceeding. See *State v. Stewart, supra.* In *Coleman v. Thompson,* 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the U.S. Supreme Court held that because there is no constitutional right to an attorney in state postconviction proceedings, "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." The Nebraska Constitution's provision for assistance of counsel in a criminal case is no broader than its counterpart in the federal Constitution. *State v. Stewart, supra.*

The majority does not explain why Williams could not have raised the issue of ineffective assistance of counsel regarding the omission of malice from the jury instructions at the time of his first postconviction proceeding. " '[A] defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion.' " *Id.* at 718, 496 N.W.2d at 528. If, as the majority states, malice has continuously been an essential element of second degree murder, the grounds for relief

existed at the time of William's first motion for postconviction relief. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, no matter how those issues may be phrased or rephrased. *State v. Stewart, supra.* Nor can those issues be raised in an appeal concerning a second motion for postconviction relief.

Therefore, I dissent from the opinion of the majority because I believe that Williams has no right to postconviction relief. As we stated in the first postconviction proceeding, the evidence against Williams was more than sufficient to sustain the convictions, and he was represented by an experienced trial lawyer who met the necessary standard to be considered effective. *State v. Williams,* 234 Neb. 890, 453 N.W.2d 399 (1990). I would affirm the district court's denial of Williams' request for postconviction relief.

HASTINGS, C.J., and CONNOLLY, J., join in this dissent.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
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June 1, 1995

J. Kirk Brown
ATTORNEY GENERAL'S OFFICE
2115 State Capitol
Lincoln, NE 68509

IN CASE OF: S-94-0542, State v. Ronald E. Williams

Appellee/Motion for Rehearing & Brf **filed** 05/15/95 **has been reviewed by the court and the following order entered:** Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

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IN CASE OF: S-94-0542, State v. Ronald E. Williams

Appe Mot to Stay Mandate **filed** 05/23/95 **has been reviewed by the court and the following order entered:** Overruled.

Respectfully,

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

LEGISLATIVE BILL 38

Passed over the Governor's veto June 1, 1977

Introduced by Judiciary Committee, Luedtke, 28, Chmn.; DeCamp, 40; Chambers, 11; Barnett, 26; Schmit, 23

AN ACT to adopt the Nebraska Criminal Code; to provide an operative date; to provide severability; to provide duties; and to repeal Chapter 28, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto, except sections 28-589.03, 28-5,103 to 28-5,106, 28-833 to 28-844, 28-1020 to 28-1031, 28-1043 to 28-1046, and 28-1108 to 28-1110, and articles 14, 15, and 16, Reissue Revised Statutes of Nebraska, 1943, and sections 28-476.01, 28-476.02, and 28-4,135.01, Revised Statutes Supplement, 1976.

* * *

Sec. 19. (1) A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

(2) Murder in the second degree is a Class IB felony.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, vs. RONALD E. WILLIAMS, Defendant.	)	Docket 119 Page 297 **ORDER**

The defendant has filed a motion for post conviction relief. Defendant's motion and the files and records of the case show to the satisfaction of the Court that the defendant is entitled to no relief and, therefore, that no evidentiary hearing need be held.

Defendant was found guilty by a jury of the crime of second degree murder and was subsequently adjudged convicted of such crime and was sentenced to a term of 20 years imprisonment on November 21, 1986.

Defendant asserts as his only assignments of error that: (1) The Court neither included nor defined "malice" as a necessary element of second degree murder in its instructions to the jury and (2) that his trial counsel failed to object to the jury instructions which neither included nor defined "malice" as a necessary element of second degree murder.

Defendant is correct in asserting that the trial court did not include nor define "malice" as a necessary element of second degree murder in its instructions to the jury and that trial counsel did not object to the jury instructions in that regard. Trial counsel's performance

clearly met the required standard in that respect inasmuch as since the adoption of the current criminal code on January 1, 1979, jury instruction on the essential elements of second degree murder virtually without exception have followed the language of the statute and have not included "malice" as a necessary element. Moreover, the omission of "malice" as a necessary element of second degree murder has never been raised as an assignment of error on appeal to the Supreme Court or to the Court of Appeals.

The defendant appealed his judgment of conviction and sentence to the Supreme Court which affirmed the judgment of conviction and sentence. *State v. Williams,* 226 Neb. 647, 413 N.W.2d 907 (1987). Subsequently, defendant filed a motion for post conviction relief which was denied and defendant appealed that judgment to the Supreme Court which affirmed the judgment of the trial court. *State v. Williams,* 234 Neb. 890, 453 N.W.2d 399 (1990). In neither appeal did the defendant raise as error the omission of malice as an essential element of the crime of second degree murder in the Court's instructions to the jury.

A motion for post conviction relief cannot be used to secure review of issues which were known to the defendant at the time of trial and which were capable of being raised but were not raised in the defendant's direct appeal or on a prior motion for post conviction relief. *State v. Petitte,* 228 Neb. 144, 421 N.W.2d 460 (1988).

Notwithstanding the foregoing, the Court addresses the defendant's assignment of error. Prior to the adoption of the present criminal code, the second degree murder

statute defined such a killing as one done "purposely and maliciously". Nebraska Revised Statute 28-402 (Reissue 1975). The current code, which became effective on January 1, 1979, states that "A person commits murder in the second degree if he causes the death of a person intentionally but without premeditation." It does not mention malice.

Since the adoption of the current criminal code, there appear to be two lines of cases that have emanated from the Supreme Court that address (or do not address) the matter of malice as an essential element of the crime of second degree murder.

In one line of cases, in which malice is not included as an essential element in the Court's instructions to the jury, the Supreme Court's opinion on appeal makes no mention of malice as an essential element. Some of those cases are: The direct appeal in this case; *State v. Lowe,* 244 Neb. 173, 505 N.W.2d 662 (1993); *State v. Toney,* 243 Neb. 237, 498 N.W. 2d 544 (1993); *State v. Houser,* 241 Neb. 525, 490 N.W.2d 168 (1992); *State v. Cave,* 240 Neb. 783, 484 N.W.2d 458 (1992); *State v. Rokus,* 240 Neb. 613, 483 N.W.2d 149 (1992); *State v. Morrow,* 237 Neb. 653, 467 N.W.2d 63, (1991); *State v. Jackson,* 231 Neb. 207, 435 N.W.2d 893 (1989); and *State v. Hardin,* 212 Neb. 774, 326 N.W.2d 38 (1982).

In *Cave,* the Supreme Court specifically stated: "In order to convict a person of second degree murder, the State is required to prove all three elements – *the death, the intent to kill, and causation* – beyond a reasonable doubt." (Emphasis added) Malice is not mentioned as an element.

In the second line of cases, although the issue of whether malice is an essential element of second degree murder was not raised, the Court, nonetheless, has repeated stated: "The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously." *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991); *State v. Franklin*, 241 Neb. 579, 488 N.W.2d 552 (1992); and *State v. Myers*, 244 Neb. 905, ___ N.W.2d ___ (1994).

In *State v. Rowe*, the killing occurred in 1980, shortly after the new criminal code became effective. In making the statement that: "The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously," the Supreme Court cited *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). In *Clermont*, the killing occurred and the case was tried under the previous criminal code wherein the statute clearly provided that for second degree murder, the killing be done purposely and maliciously and, therefore, "purposely" and "maliciously" were, under the prior criminal code, clearly elements of second degree murder.

In concluding that "The essential elements of the crime of murder in the second degree are that the killing be done purposely and maliciously," the *Moniz* court cites *Rowe*, the *Ettleman* court cites *Moniz*, and *Trevino* court cites *Ettleman*, the *Dean* court cites *Trevino* and *Ettleman*,

the *Franklin* court cites *Dean* and *Rowe*, the *Illig* court cites *Rowe*, and the *Myers* court cites *Rowe*, *Franklin*, and *Dean*.

It should be noted that in *Ettleman*, *Trevino*, and *Illig*, the Court held that "purposely and maliciously" are essential elements of second degree murder notwithstanding that the instructions to the jury gave the elements in the language of the criminal code and did not include "purposely and maliciously".

And, in *Illig*, notwithstanding that the jury instruction did not include "purposely or maliciously" and notwithstanding that the Supreme Court held that "purposely and maliciously" are essential elements of second degree murder, the Supreme Court earlier in its opinion stated that: "The trial court correctly instructed the jury as to second degree murder. . . . " *Illig* at 601.

It appears that the use of the language "purposely and maliciously" from the prior criminal code began in *State v. Rowe, supra* and was perpetuated in the above cited cases that followed. Although as stated above, no cases have raised as an assignment of error that malice was not included as an essential element in the jury instructions, the Court in *Meyers* took up the matter as plain error and specifically concluded that malice is an essential element of second degree murder and, for the first time, the Court, addressing that issue, stated that: "By omitting the element of malice from the second degree murder instruction, the instruction, in effect, became one for the crime of intentional manslaughter as defined by this Court in *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). Malice is not an essential element of manslaughter."

However, in *Pettit*, the Court stated: "Consequently, we hold that, to sustain a conviction for voluntary manslaughter under Section 28-305(1), that is, a conviction for killing another, without malice, 'upon a sudden quarrel', the State, by evidence beyond a reasonable doubt, must prove that the defendant intended to kill, and did kill, another. Thus, intentional criminal homicide as a result of legally recognized provocation *distinguishes voluntary manslaughter "upon a sudden quarrel" from another intentional criminal homicide, murder in the second degree,* namely, 'a person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.' Section 28-304." (Emphasis added)

Notwithstanding the foregoing, the Supreme Court in *State v. Jones* in an opinion filed May 6, 1994, has now determined that there is no longer voluntary manslaughter consisting of an intentional criminal homicide and, therefore, there is no such crime in Nebraska as intentional manslaughter. The Court went on to say that: "Malice has most recently been defined in our cases as 'that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse' ", and followed by: "Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel is the presence or absence of an intention to kill. *State v. Pettit,* 233 Neb. 436, 445 N.W.2d 890 (1989) was incorrect in its reasoning and holding, and to that extent, it is overruled."

By that language, the Court appears to have done two things:

1. It has eliminated its articulation of a rationale for its conclusion that malice is an essential element of second degree murder which was previously stated in *State v. Myers,* which was and is the only articulated rationale for the entire line of cases beginning with *State v. Rowe* where the Court has held that "purposely" and "maliciously" are essential elements of the crime of second degree murder.

2. In distinguishing second degree murder and manslaughter upon the presence or absence of an intention to kill, coupled with its definition of malice, it has equated "malice" with "intentional" thus making it difficult to rationalize the notion that "malice" in addition to "intentional" are both necessary elements of second degree murder.

Taking into consideration that:

1. There are no common law crimes in Nebraska. *State v. Schaaf,* 234 Neb. 144, 449 N.W.2d 762 (1989) and *State v. Pettit, supra.*

2. Within constitutional boundaries, the legislature is empowered to define a crime and punish a person's conduct expressly declared to be criminal. *State v. Pettit, supra.*

3. In construing a penal statute, the Court cannot supply language which is absent from the statutory definition for a criminal offense. *State v. Schaaf, supra.*

4. No act is criminal unless the legislature has in expressed terms declared it to be so and no person can be punished for an act or omission which is not made penal by the plain

import of written law. *See State v. Douglas,* 222 Neb. 833, 388 N.W.2d 801 (1986).

5. It is a fundamental principle for statutory construction that a penal statute is to be strictly construed. *State v. Douglas, supra.*

6. Strict construction of a criminal statute is based on the need to provide fair warning of what conduct is criminal and to ensure that the legislature rather than the courts define criminal behavior. *Huddleston v. United States,* 415 U.S. 814, 94 S.Ct. 1262 (1974).

7. A jury instruction that charges the jury in the statutory language of the crime is appropriate. *See State v. Jordan,* 229 Neb. 563, 427 N.W.2d 796 (1988).

this Court concludes that the better reasoned line of cases appears to be those in which the Supreme Court has affirmed the conviction and sentence on appeal where the jury instructions submitted the elements in the language of the statute and the Court did not indicate that "purposely and maliciously" were essential elements of the crime of murder in the second degree.

Therefore, the Court finds that the instruction given here on the elements of second degree murder in the language of the statute, but not including "malice" was appropriate, and that, therefore, defendant's contention that it was error to fail to include malice as a necessary element is without merit.

WHEREFORE, IT IS ORDERED, that defendant's motion for relief under the Nebraska Post Conviction Act be and the same is hereby overruled.

Dated this 11th day of May, 1994.

/s/ James A. Buckley
Judge